No. 9251

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROS. COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROS. COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

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Appellee.

BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

Upon Appeal from the District Court of the United States, for the District of Montana.

STATEMENT OF JURISDICTIONAL FACTS

This is an appeal from a final Judgment of Dismissal on a Motion to dismiss the Complaint and Petition for Declaratory Judgment based on the ground that the Complaint and Petition for Declaratory Judgment does not state facts sufficient to constitute a cause of action. (R. p. 94.)

In the Complaint it is alleged: That this is a suit of a civil nature and is a case of actual controversy, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. (R. p. 3, par. 2.)

That the plaintiff during all the times mentioned in the Complaint was a corporation organized under and by virtue of the laws of the State of Montana and is a resident and citizen of the State of Montana. (R. p. 4, par. 5.) That the defendant, Winston Bros. Company, during all the times mentioned in the Complaint, was and now is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is a resident and citizen of the State of Minnesota. (R. p. 3, par. 1.) That the defendant, Bynum Irrigation District, is a public corporation of the State of Montana and a resident and citizen of the State of Montana. (R. p. 4, par. 3.) That the defendant, Teton Cooperative Reservoir Company, is a corporation organized and existing under and by virtue of the laws of the State of Montana, and is a citizen of and resident of the State of Montana. (R. p. 7, par. 6.) That the plaintiff did, in writing, request and demand that the defendants, Teton Cooperative Reservoir Company and Bynum Irrigation

District, join the plaintiff as parties plaintiff in the action but that each refused and still refuses to join the plaintiff as a party plaintiff, for the purpose of litigating the controversy set forth in the Complaint. (R. p. 4, par. 3.)

The District Court had jurisdiction of the action on the ground of diversity of citizenship between the plaintiff and the defendant, Winston Bros. Company. (28 USCA 41, Subdiv. (b) Sec. (1)). It is alleged in the Complaint that this is a suit in equity of a civil nature and is a case of actual controversy. (R. p. 3, par. 2.) The allegations of the Complaint and Petition for a Declaratory Judgment are to the effect that the defendant, Winston Bros. Company, had obtained a Judgment against the Teton Cooperative Reservoir Company and claimed a lien against the lands and premises of the Teton Cooperative Reservoir Company which were necessary and are being used for irrigation purposes to irrigate the lands of the stockholders of the plaintiff corporation, and the lands of persons claiming rights to water from the Teton Cooperative Reservoir Company by reason of the ownership of stock in the Teton Cooperative Reservoir Company. It is alleged that all of the property in question is appurtenant to the lands irrigated by means of the water stored on the lands of the Teton Cooperative Reservoir Company, and used for the diversion of the same to the place of use. It is further alleged that the defendant, Winston Bros. Company, claims a lien against the lands of the Teton Cooperative Reservoir Company used for irrigation purposes, and has threatened to and will, unless restrained by an Order

of the Court, obtain a Writ of Execution for the purpose of selling the land under and by virtue of such Writ of Execution. In its prayer, the plaintiff prays that the Court declare the rights of the plaintiff in and to the lands of the Teton Cooperative Reservoir Company, under the Declaratory Judgment Act of the United States of America and to declare that the Winston Bros. Company has no lien against said lands but that the plaintiff and its stockholders have the right to take 156/1000 part of the waters of the reservoir located on the lands in question, free and clear from any lien of the Judgment of said Winston Bros. Company. (R. pp. 3-24.) The Complaint of the plaintiff was filed in the office of the Clerk of the District Court on July 21, 1937. (R. p. 24.)

Since the Complaint was filed, the Federal Rules of Civil Procedure have been adopted. Rule 57 provides that the procedure for obtaining a Declaratory Judgment shall be in accordance with these rules and that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

This case presents an actual controversy, as to whether or not Winston Bros. Company could, unless restrained by this Court, obtain a Writ of Execution and proceed to sell the property of Teton Cooperative Reservoir Company. Therefore, the District Court had jurisdiction to declare the rights of the parties under the Declaratory Judgment Act of the United States. (28 USCA 400.)

It is alleged in the Complaint that unless the Judgment in favor of Winston Bros. Company against Teton Co-

operative Reservoir Company is adjudged not to be a lien against the reservoir site and irrigation facilities of the Teton Cooperative Reservoir Company, the Judgment will be and remain a cloud upon the title upon the property in question, to the irreparable damage and injury of the plaintiff and its stockholders: (R. p. 17, par. 16.) The property in question is located in the District of Montana. Therefore, the District Court had jurisdiction to remove the cloud cast by the Judgment. (28 USCA 118.)

JURISDICTION OF THIS COURT

Judgment in the instant case was rendered and filed on the 14th day of April, 1939. (R. p. 94.) The Notice of Appeal of this Court was filed on July 11, 1939, (R. p. 98) and on July 11, 1939, an Undertaking on Appeal was filed with the Clerk of the District Court. (R. pp. 98-100.)This Court has jurisdiction of the appeal for the reason that the Judgment of the District Court is a final decision within the meaning of Subdivision (a), 28 USCA 225. The appeal was taken by filing of the Notice of Appeal with the Clerk of the District Court within three (3) months from the date of the entry of the Judgment (Rule 73 of the Federal Rules of Civil Procedure), and was therefore within the time prescribed in 28 USCA 230. The record on appeal was docketed in the office of the Clerk of this Court on July 31, 1939, and was therefore docketed within the time prescribed in Subdivision (g) of Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The appellant, Brady Irrigation Company, filed its Complaint and Petition for a Declaratory Judgment. (R. pp. 3-24.) The appellee, Winston Bros. Company, interposed a Motion to dismiss the Complaint and Petition for Declaratory Judgment on the ground that the same does not state facts sufficient to constitute a cause of action. (R. p. 25.) The Motion to dismiss the Complaint and Petition for Declaratory Judgment was submitted to the Court on Briefs and a decision of the Court was rendered sustaining the Motion to dismiss. (R. pp. 78-92.) Thereafter, a Judgment of Dismissal was rendered by the Court. (R. p. 94.)

In addition to the allegations of the Complaint and Petition for a Declaratory Judgment showing the jurisdiction of the District Court, it is alleged:

That Teton Cooperative Reservoir Company is a corporation with a capital stock of 1000 shares, and ever since its organization has been operated only for the purpose of delivering water for irrigation and domestic purposes to its stockholders. It has at no time operated for profit and its only income has been from assessments levied against its outstanding capital stock, and the sale of such capital stock. Its income from these sources has been used solely for the purpose of maintaining, constructing and repairing certain irrigation facilities, consisting of a reservoir, ditches and canals.

The Teton Cooperative Reservoir Company in 1918 adopted a By-Law to the effect that each share of its capital stock "entitles the holder thereof to the use dur-

ing the irrigation season each year, of a 1/1000 part of the waters, water rights and irrigating facilities and systems of this Company." That the Teton Cooperative Reservoir Company is the owner of approximately 577.81 acres of land and is also entitled to the possession of lands on the public domain of approximately 3387.19 acres, which are used for reservoir purposes. On this land the Teton Cooperative Reservoir Company has constructed dams, reservoirs, ditches, canals and other works for the sole purpose of storing and supplying water to its stockholders. The water carried, stored and distributed by means of these irrigation facilities is used for irrigation and domestic purposes by its stockholders and the stockholders of the plaintiff corporation. (R. pp. 7-11.)

That all of the lands of the Teton Cooperative Reservoir Company are necessary and are being used for the purpose of carrying and storing waters for the irrigation of the lands within the Bynum Irrigation District, which is one of the stockholders of the Teton Cooperative Reservoir Company, and the lands of the stockholders of the plaintiff, and a few other stockholders. (R. par. 15, pp. 16-17.) All of the water stored in the reservoir of the Teton Cooperative Reservoir Company is necessary for the irrigation of lands within the Bynum Irrigation District and the lands belonging to the stockholders of the plaintiff, and other stockholders of the Teton Cooperative Reservoir Company. (R. pp. 18-19, par. 20.)

That the plaintiff at all times mentioned in the Complaint was a corporation organized and operating only for the purpose of delivering water for irrigation and

domestic purposes to its stockholders, and has been operated as a cooperative association and not for profit. No dividends have been paid by the plaintiff corporation to its stockholders, or earned, and its only income is obtained from assessments levied against its capital stock, consisting of 500 shares. All the proceeds of the sale of this capital stock and the assessments have been devoted solely for the construction and maintenance of irrigation facilities and the purchase of stock from the Teton Cooperative Reservoir Company. Each share of the capital stock of the plaintiff corporation entitles the owner thereof to 1/500 part of the waters appropriated and diverted by the plaintiff corporation. That the plaintiff is the owner of 156 shares of stock of the Teton Cooperative Reservoir Company and is entitled to 156/1000 part of the waters of the Teton Cooperative Reservoir Company, delivered to the plaintiff at the headgate of the reservoir belonging to the Teton Cooperative Reservoir Company. All of the capital stock of the plaintiff, consisting of 500 shares, have been issued and are outstanding. (R. par. 5, p. 4 to p. 8.) That the plaintiff has agreed and is under legal obligation to supply its stockholders the proportionate share of the waters from the reservoir of the Teton Cooperative Reservoir Company to which it is entitled, under and by virtue of the ownership of 156 shares of the stock of the Reservoir Company, and if the lands and other property of the Teton Cooperative Reservoir Company are sold under a Writ of Execution which may be obtained by the defendant, Winston Bros. Company, then the plaintiff will be deprived of its ability

to deliver water for irrigation and domestic purposes to its stockholders and thus breach its agreement with its stockholders and thus breach its agreement with its stockholders. That the property of the Teton Cooperative Reservoir Company on which the irrigation facilities are located, is appurtenant to the lands of the stockholders of the plaintiff, and the lands within the Bynum Irrigation District, and others owning stock of the Teton Cooperative Reservoir Company. (R. par. 14, p. 15, to par. 16, p. 17.) That the reservoir constructed on the lands of the Teton Cooperative Reservoir Company is necessary for the purpose of storing water for irrigation purposes by the stockholders of the plaintiff, the lands within the Bynum Irrigation District, and the lands of other stockholders of the Teton Cooperative Reservoir Company, and this land and this reservoir has always been used for this purpose. The 500 shares of the capital stock of the plaintiff corporation are now held by owners of approximately 10,000 acres of land in Pondera County, Montana, which is being irrigated from the waters of the reservoir in question. (R. p. 17, par. 17 to p. 18, par. 20.)

It is alleged in the Complaint that Bynum Irrigation District is a public corporation of the State of Montana organized and existing and operating as an irrigation district, under and by virtue of Chapter 146 of the Laws of 1909 of the State of Montana, and the amendments thereto. (R. par. 4, p. 4.) During the year 1925, Bynum Irrigation District became the owner of 804 shares of the capital stock of the Teton Cooperative Reservoir Company, and ever since has been the owner of the same.

(R. p. 11, par. 10.) Prior to the acquisition of this stock of the Teton Cooperative Reservoir Company, the Bynum Irrigation District was without water with which to irrigate the lands within the District and the stock of the Teton Cooperative Reservoir Company was obtained for the sole purpose of providing water for the irrigation of the lands within the Bynum Irrigation District. (R. pp. 11-12, par. 11.)

The defendant, Winston Bros. Company, obtained a judgment in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Teton, against Teton Cooperative Reservoir Company, in the sum of $29,596.53. This judgment was obtained for certain work done by Winston Bros. Company in enlarging the reservoir used for irrigation purposes and located on the lands of the Teton Cooperative Reservoir Company. It is alleged in the Complaint that when this construction work was done by the Winston Bros. Company, the Company and its officers knew that the By-Laws of the Teton Cooperative Reservoir Company provided that each share of the capital stock of the Teton Cooperative Reservoir Company entitled the holder thereof to the use during the irrigation season of a 1/1000 part of the waters, water rights, irrigation facilities and systems of the Teton Cooperative Reservoir Company, and that said Winston Bros. Company and its officers knew that all of the lands on which the irrigation facilities are located were necessary for the irrigation purposes of the stockholders of the Teton Cooperative Reservoir Company. That ever since the judgment was rendered, and

for a long time prior thereto, the Bynum Irrigation District was a bankrupt, and hopelessly insolvent. (R. p. 12, par. 12 to p. 15, par. 13.)

It is alleged that the defendant, Winston Bros. Company, claims a lien against the lands, reservoir sites, reservoir and premises owned by the Teton Cooperative Reservoir Company, and unless restrained by an Order of this Court, will apply for and obtain a Writ of Execution from the Clerk of the Court in which the judgment was rendered, and will cause the lands of the Teton Cooperative Reservoir Company, the reservoir site, and other property of the Company, to be sold under and by virtue of the Writ of Execution. (R. p. 15, par. 13.) That a sale of the land of the Teton Cooperative Reservoir Company would deprive the plaintiff of its ability to deliver water for irrigation and domestic purposes to its stockholders. (Par. 14, p. 15.) It is further alleged in the Complaint that the judgment in favor of Winston Bros. Company is not a lien against the property on which the irrigation facilities of the Teton Cooperative Reservoir Company are located, but that unless it is decreed by this Court that it is not a lien against the said property, the judgment will be and remain a cloud upon the title of the property and cause irreparable damages to the plaintiff and its stockholders. (R. pp. 16-17, par. 15-16.) The plaintiff, in the prayer of its complaint, prays for a restraining order to restrain the defendant Winston Bros. Company, from causing the property of the Teton Cooperative Reservoir Company from being sold under a Writ of Execution, and for a Declaratory Judgment to

the effect that the property of the Teton Cooperative Reservoir Company necessary for irrigation purposes is not subject to a lien, by reason of this Judgment, and cannot be sold under and by virtue of any Writ of Execution issued on said judgment, and that the Court declare that the Brady Irrigation Company and its stockholders have the right to take 156/1000 part of all of the waters of the reservoir located on the land of the Teton Cooperative Reservoir Company.

SPECIFICATION OF ERRORS

The Court erred in the following respects:

I.

In granting the Motion of the defendant, Winston Bros. Company to dismiss the plaintiff's Complaint and Petition for Declaratory Judgment.

II.

In rendering Judgment dismissing the plaintiff's Complaint and Petition for a Declaratory Judgment.

III.

In holding that the Complaint did not state facts sufficient to entitle the plaintiff to a Judgment declaring the rights and easements of the plaintiff by reason of its ownership of 156 shares of the capital stock of the Teton Cooperative Reservoir Company in and to the property used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

IV.

In holding that the Complaint of the plaintiff did not

state facts sufficient to constitute a cause of action in favor of the plaintiff, for a Declaratory Judgment declaring that the plaintiff has an easement in and to the lands necessary for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company.

V.

In holding that the Judgment of the defendant, Winston Bros. Company, a corporation, is a lien enforceable by Writ of Execution and sale against the property which is necessary and is used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

VI.

In failing to hold that the appellant, Brady Irrigation Company, was not entitled to a Judgment declaring that any lien which the appellee, Winston Bros. Company, a corporation, may have against the land described in the Complaint and held by Teton Cooperative Reservoir Company, is subject to an easement of the appellant, Brady Irrigation Company, for the purpose of diverting, storing and carrying water for irrigation puposes on and across said land.

VII.

In holding that the lands necessary for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company, are not appurtenant to the lands of the stockholders of the appellant, Brady Irrigation Company, irrigated with waters diverted, impounded and stored by means of the irrigation works on said lands

under the supervision of Teton Cooperative Reservoir Company.

VIII.

In holding that the Complaint of the plaintiff did not state facts sufficient to constitute a cause of action for an injunction restraining a sale under a Writ of Execution of the property described in the Complaint which is necessary and used for irrigation purposes, the legal title to which stands in the name of Teton Cooperative Reservoir Company.

SUMMARY OF ARGUMENT

The Property of the Reservoir Company is Appurtenant to the Land Irrigated.

The By-Laws of Teton Cooperative Reservoir Company and appellant, entitling their stockholders to the use during the irrigation season, of their proportionate share of the water rights and irrigation facilities of the Reservoir Company, are enforceable contracts. Hyink vs. Low Line Irrigation Co., 62 Mont. 401; 205 Pac. 236; Dyk, et al vs. Buell Land Company, et al, 70 Mont. 557; 227 Pac. 71; Miller vs. Imperial Water Company, 156 Cal. 27; 103 Pac. 227, 24 LRA (N. S.) 372; Brady Irrigation Co. vs. Teton County, et al, 107 Mont. 330; 85 Pac. (2d) 350.

The issuance of shares of stock constitute grants of the right to the use of water and the irrigation facilities of the Reservoir Company. Pacific States Savings and Loan Corporation vs. Schmitt, et al, 103 Fed. (2d) 1002; Adamson vs. Black Rock Power & Irrigation Co., (9

Cir.) 297 Fed. 905; Allen, et al, vs. Railroad Commission of California, 179 Cal. 68, 175 Pac. 466; 67 C. J. 1410, Sec. 1080.

The method of obtaining water for the Bynum Irrigation District by the purchase of stock entitling the Irrigation District to its proportionate share of the water rights and irrigation facilities of the Reservoir Company, was authorized by the laws of the State of Montana and therefore, the water rights and irrigation facilities of the Reservoir Company are, by the force of the decision of the Supreme Court of the State of Montana and statutory law pertaining to irrigation districts, appurtenant to the lands irrigated within the district. Thaanum vs. Bynum Irrigation District, et al, 72 Mont. 221; 232 Pac. 528; 7174 Rev. Codes of Mont. 1935; 7202 Rev. Codes of Mont. 1935; 6671 Rev. Codes of Mont. 1935; Brady Irrigation Company vs. Teton County, et al, 107 Mont. 330; 85 Pac. (2d) 350; Yellowstone Valley Co. vs. Associated Mortgage Investors, 88 Mont. 73; 290 Pac. 255; Pacific States Savings and Loan Corporation vs. Schmitt, et al, 103 Fed. (2d) 1002.

The Property of the Reservoir Company is Not Subject to a Lien by Reason of the Judgment of Appellee.

The aggregate value of the rights of the stockholders in and to the property of the Reservoir Company is the total value of such property, the shares of the stockholders being the muniments of title to the water rights and irrigation facilities. Pacific States Savings and Loan Corporation vs. Schmitt, et al, 103 Fed. (2d) 1002; Brady Irrigation Company vs. Teton County, et al, 107 Mont.

330; 85 Pac. (2d) 350. Therefore, a sale of property of the Reservoir Company would not defeat the easements of the landowners entitled to the use of water rights and irrigation facilities of the Reservoir Company. Chumasero vs. Viall, 3 Mont. 376; MacGinniss Realty Co. vs. Hinerager, 63 Mont. 172; 206 Pac. 436; Fox vs. Curry, 96 Mont. 212; 29 Pac. (2d) 663.

The Reservoir Company is the holder of the bare, naked legal title to the property used for irrigation purposes. Osterman vs. Baldwin, 73 U. S. 90, 18 L. Ed. 730; Story vs. Black, 5 Mont. 26; 1 Pac. 5; Princeton Mining Co. vs. First National Bank of Butte, et al, 7 Mont. 530; 19 Pac. 210. An attempted sale of the property of the Reservoir Company would therefore be restrained by a court of equity, since it would destroy the property rights of its stockholders without benefitting the judgment creditors, except perhaps in a very minor degree. Sec. 15, Article 3, Constitution of Montana; Gue vs. The Tidewater Canal Company, 65 U. S. 228, 16 L. Ed. 635; Eldridge vs. Mill Ditch Co., 90 Ore. 590, 177 Pac. 939.

The Complaint States a Cause of Action to Remove a Cloud on Title.

28 USCA 118; Dick vs. Foraker, 155 U. S. 404; 39 L. Ed. 201; Johnson vs. North Star Lumber Company, 206 Fed. 624; Louisville, etc. Railway Co. vs. Western Union Telegraph Co., 234 U. S. 369; 58 L. Ed. 1356; Thompson vs. Emmett Irrigation Dist., (9 Cir.) 227 Fed. 560.

The Complaint States a Cause of Action for a Declaratory Judgment.

28 USCA 400; Gully vs. Interstate Natural Gas. Co., Inc., (5 Cir.) 82 Fed. (2d) 145; Nashville C. & Stlr. Co. vs. Wallace, 288 U. S. 249; 53 S. Ct. 345; 77 L. Ed. 730; 87 A. L. R. 1191; U. S. vs. West Virginia, 295 U. S. 463; 55 S. Ct. 789; 79 L. Ed. 1546.

Appellant derived no benefits from the indebtedness for which the judgment was rendered and therefore should not be deprived of its rights in the property of the Reservoir Company.

ARGUMENT

The Property of Reservoir Company is Appurtenant to the Land Irrigated.

The principal question for decision by this appeal is whether or not the Complaint and Petition for Declaratory Judgment of the plaintiff states facts sufficient to constitute a cause of action under any theory. If it does, the motion to dismiss should have been denied. Since all of the Specifications of Error relate to the question as to whether or not the Motion should have been granted, we will dispose of all of the Specifications of Error by grouping them for the purpose of argument.

Neither the plaintiff nor the Teton Cooperative Reservoir Company have ever been operated for profit. Each corporation, by a By-Law, defined the rights of its stockholders as to the amount of water for irrigation purposes

to which each share of stock entitled a stockholder. The By-Law of the Reservoir Company set forth in full in the Complaint of the plaintiff (R. p. 8) provides that each share of its capital stock entitles the holder thereof to the use, during the irrigating season, of each year "of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this Company." The By-Law of the appellant corporation provides that each share of its capital stock represents and controls 1/500 part of all the waters appropriated and diverted by the corporation, and the owner of record of any share is entitled to the use of said proportion of said waters of the corporation. (R. p. 6.) These By-Laws are enforceable contracts.

Hyink vs. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236; Dyk, et al, vs. Buell Land Company, et al, 70 Mont. 557, 227 Pac. 71; Miller vs. Imperial Water Company, 156 Cal. 27, 103 Pac. 227, 24 LRA (N. S.) 372; Brady Irrigation Co. vs. Teton County, et al, 107 Mont. 330, 85 Pac. (2d) 350.

In a very similar case, Mr. Circuit Judge Healy of this Court, in Pacific States Savings & Loan Corporation vs. Schmitt, et al, (103 Fed. (2d) 1002) very aptly said:

> "If we disregard nomenclature and the formal recital of powers possessed but never asserted or exercised, there is nothing in the history or situation of any of these corporations to differentiate them from the mutual non-profit irrigation companies so familiar in the

arid states. In substance, the shares are mere muniments of title to rights in available water and to proportionate interests in the irrigation systems operated by the corporations as agents of their shareholders. Prosole v. Steamboat Canal Co., 37 Nev. 154, 140 P. 720, 144 P. 744. Compare In Re Thomas' Estate, 147 Cal. 236, 81 P. 539."

Therefore, when the Reservoir Company issued a share of its stock, it entered into a contract whereby the holder of such share is entitled to a 1/1000 part of the waters, water rights and irrigating facilities and systems of the Company. The irrigating facilities and systems mentioned in the By-Law must include all canals, ditches, reservoirs, dams and other works used for the purpose of diverting, storing and delivering water. It is alleged in the Complaint that all of the property, which consists of 577.81 acres (R. p. 9), is necessary to be occupied by a reservoir, canals, ditches, headgates and other improvements which are necessary for the conveyance, storage and distribution of irrigation water from the reservoir. (R. p. 17, par. 17.)

The contract entered into with the Reservoir Company and the stockholder upon the purchase of each share of stock, granted such stockholder the perpetual right to the use of 1/1000 part of the waters, water rights, irrigating facilities and systems of the Company. In Adamson vs. Black Rock Power & Irrigation Co. (9 Cir.), 297 Fed. 905, Mr. District Judge Bourquin, speaking for this Court, said:

"The sale of the perpetual use of a thing is a sale of the thing, whatever ground rent or other charge be

reserved. That is true of the right to the use of water as of aught else. Appellant's deeds are of land, "with the perpetual right to the use of water from the main canal," "the water right, . . . not personal property, but is appurtenant to the land," and "transferable only with the land." It is true a sale and delivery of water or of a water right may convey no right in, to, or upon source of supply or instrumentalities; but it is otherwise of a sale of perpetual water supply or permanent water right from a canal, or sale of land with appurtenant water right and service. These latter impress the source and instrumentalities in the power of the grantor and necessary to enjoyment of the water with a servitude or easement of which the grantee cannot be deprived without his consent."

In Allen, et al, vs. Railroad Commission of California, 179 Cal. 68, 175 Pac. 466, Mr. Justice Shaw, speaking for the Supreme Court of California, said:

"There is no ground for the claim that the water distributing system used by the water company can be considered as a thing separate from the right to receive water and declared to be a separate and public service, the rates for which, as to these petitioners, can be fixed by the Railroad Commission, and made to exceed the rates specified in the water certificates. The distributing system is a species of real property. Stanislaus W. Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359. The right of a landowner to receive water not devoted to public use upon land for its benefit, from an outside source, through a system of canals or pipes for conducting it to the land, is an easement attached to the land and a corresponding servitude upon the source of supply and the distributing system. Copeland v. Fair View Co., 165 Cal. 154, 131 Pac. 119; Palermo Co. v. Railroad Commission, 173 Cal. 386, 160 Pac. 228. The easement and the servitude constitute a single entity and the one cannot be separated from the other without destroying both. The petitioners have property

interests in the distributing system by reason of these easements and servitudes. The contract fixed the rate, not only for the water as such, but also for its delivery; that is, for the use of the system for that purpose. To raise the rate without consent of the landowner would impair the obligation of the contract, and, so far as the increase inured to the benefit of the public use of other water through the same system, it would be taking the private property of these petitioners for public use without compensation."

In 67 C. J. 1410, Sec. 1080, the rule is stated as follows:

"A distributor of water for irrigation purposes may sell and convey to a consumer a water right, entitling him to receive a certain quantity of water from its system, and a purchaser or mortgagee of the irrigation system, or of the part thereof from which such consumer has the right to water, with knowledge of the previous grant, will be bound by the grantor's covenants. A conveyance of a permanent right to receive a certain quantity of water for irrigation may be made, which conveyance amounts to the conveyance of an easement in the ditch or system furnishing the water, and such water right becomes appurtenant to, and a part of, the land."

The Bynum Irrigation District, one of the joint owners of stock of the Reservoir Company, is a public corporation of the State of Montana, organized, existing and operating as an irrigation district under and by virtue of Chapter 146 of the Laws of 1909 of the State of Montana, and the amendments thereto. (R. p. 4, par. 4.)

The Bynum Irrigation District is the owner of 804 shares of the capital stock of the Reservoir Company, and this stock was purchased for the sole purpose of provid-

ing water for the irrigation of the lands within the irrigation district. (R. p. 12.) Sec. 7174, Revised Codes of Montana, 1935, as amended, defines the powers of the Board of Commissioners of an irrigation district, and Subdivision (3) of that section provides for obtaining water for irrigation purposes within the district as follows:

> "The board shall have power and authority to appropriate water in the name of the district, to acquire by purchase, lease, or contract, water and water rights; additional waters and supplies of water, canals, reservoirs, dams and other works already constructed, or in the course of construction, with the privilege, if desired, to contract with the owner, or owners of such canals, reservoirs, dams and other works so purchased and in the course of construction, for the completion thereof and shall also have power and authority to acquire by purchase, lease, contract, condemnation, or other legal means, lands (and rights in lands) for rights-of-way, for reservoirs, for the storage of needful waters, and for dam sites, and necessary appurtenances, and such other lands and property as may be necessary for the construction, use, maintenance, repair, improvement, enlargement and operation of any district system of irrigation works."

When the Bynum Irrigation District negotiated with the Reservoir Company for the purchase of stock, W. A. Thaanum, one of the owners of land within the District, objected to this method of obtaining water for irrigation purposes within the District and instituted suit in the State courts to obtain an injunction restraining the District and its commissioners from expending any money for the purpose of purchasing the stock in question. The Supreme Court of the State of Montana upheld the pur-

chase of stock in the Reservoir Company, as a means of obtaining water for irrigation purposes within the District. Thaanum vs. Bynum Irrigation District, et al, 72 Mont. 221, 232 Pac. 528. Section 7202, Revised Codes of Montana, 1935, which is part of the statutory law of Montana governing irrigation districts within the State, provides as follows:

> "The board of commissioners shall apportion the water for irrigation among the lands in the district in a just and equitable manner, and the maximum amount apportioned to any land shall be the amount that can be beneficially used on said land, and such amount of water shall become and shall be appurtenant to the land and inseparable from the same, but subject to reduction as hereinafter provided; provided, however, that any water owner of the district shall have the right to sell or assign for one season any of the water apportioned to him, and not required for use upon the land to which such water belongs; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress, and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto."

The foregoing section specifically provides that the amount of water apportioned to land within the District "shall be appurtenant to the land and inseparable from the same." When the Supreme Court of the State of Montana, in Thaanum vs. Bynum Irrigation District, approved the purchase of stock from the Reservoir Company as a means of obtaining water for irrigation purposes, it certainly must have, by implication, decided that when water for irrigation purposes was thus acquired

by the purchase of stock from the Reservoir Company, such water became appurtenant to the land within the District. If the water and the right to the use of the same, to which the Bynum Irrigation District is entitled, is appurtenant to the land irrigated by such water, then it must follow that the same is true with respect to the water obtained from the Reservoir Company by other stockholders of the last mentioned company.

Section 6671, Revised Codes of Montana, 1935, provides that:

> "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."

The foregoing statute has on at least two occasions been applied by the Supreme Court of the State of Montana, where questions similar to those involved in this case were disposed of. In Brady Irrigation Company vs. Teton County, et al, 107 Mont. 330, 85 Pac. (2d) 350, the Court held that none of the property of the Teton Cooperative Reservoir Company was subject to taxation because the same was appurtenant to the land which was irrigated by means of the irrigation facilities located on the property of the Reservoir Company and therefore taxed when the irrigated land in question was taxed. Mr. Justice Anderson, speaking for the Court in that case said:

> "The owners of the stock in the Teton Cooperative Reservoir Company do not own the equitable title to the property of that corporation, but their relation to it is one of contract. (Hyink v. Low Line Irr. Co., 62

Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71.) These contracts give to the stockholder the right to receive, through the irrigation facilities of the Teton Company, his pro rata share of the water stored. The shareholder in the plaintiff company likewise has a contractual right to his pro rata share of the water received by that company. These rights, when used on certain lands, become appurtenant to such lands. (Sec. 6671, Rev. Codes.) *The aggregate value of all of these rights is the total value of the property owned by the Teton Company, and its property has no other use than the storing and distribution of water in performance of these contractual rights.*" (Italics ours.)

Mr. Chief Justice Callaway, in Yellowstone Valley Co. vs. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255, said:

"In Ireton v. Idaho Irr. Co., 30 Ida. 310, 164 Pac. 687, 689, we find the following: 'It is contended by appellant that the shares of stock in the operating company are personal property, and that the water right passed by assignment of them, and did not become subject to the mortgage on the land. While shares of stock in an ordinary corporation, organized for profit, are personal property (sec. 2747, Rev. Codes; State v. Dunlap, 28 Idaho, 784, and cases therein cited on page 802, 156 Pac. 1141 (Ann. Cas. 1918A, 546), and while this court has held shares in an irrigation company to be personal property (Watson v. Molden, 10 Idaho, 570, 79 Pac. 503) the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right . . . and own-

ership of them passes with the title which they evidence. (In re Thomas' Estate, 147 Cal. 236, 81 Pac. 539; Berg v. Yakima Valley Canal Co., 83 Wash. 451, L. R. A. 1915D, 292, 145 Pac. 619).' The doctrine announced in the foregoing cases is suited to our history and conditions and meets with our approval. Defendant's counsel cite decisions from the supreme court of Colorado to sustain the decision of the lower court, but with these we are unable to agree."

This Court, in Pac. States Savings & Loan Corp. vs. Schmitt, et al, 103 Fed. (2d) 1002, disposed of a situation similar to that presented in the instant case. Mr. Circuit Judge Healy, in that case said:

"It is a generally accepted principle in the arid states that shares in a non-profit irrigation company are appurtenant to the land of the shareholder irrigated through the system. They pass upon conveyance of the land and appurtenant water rights, although the stock may not be mentioned or the certificates formally transferred. In Re Thomas' Estate, supra; Ireton v. Idaho Irrigation Co., 30 Idaho 310, 164 Pac. 687; In Re Johnson's Estate, 64 Utah 114, 228 P. 748; Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 P. 255, 70 A. L. R. 1002; Burnett v. Taylor, 36 Wyo. 12, 252 P. 790; Twin Falls Land & Water Co. v. Twin Falls Canal Co., D. C., 7 F. Supp. 238, affirmed, 9 Cir., 79 F. 2d 431. The intimate legal relationship between land and water beneficially applied upon it, whether the water is directly appropriated or obtained through the intermediary of a canal company, finds ample recognition in Prosole v. Steamboat Canal Co., supra. We are satisfied that stock in irrigation companies should be held to have in Nevada the status usually accorded such property in other jurisdictions faced with similar problems."

Since all of the property of the Reservoir Company described in the Complaint is necessary for the purpose

of storing, diverting and carrying water for irrigation purposes to the lands of the Bynum Irrigation District, the stockholders of the appellant corporation, and other stockholders of the Reservoir Company, it follows that the persons entitled to the use of this water and the use of the irrigation facilities for irrigation purposes, have easements in all of the property of the Reservoir Company which are appurtenant to the lands irrigated with the water.

The Property of the Reservoir Company is Not Subject to a Lien by Reason of the Judgment.

In Pacific States Savings & Loan Corp. vs. Schmitt, 103 Fed. 1002, Mr. Circuit Judge Healy of this Court characterized corporations similar to the Teton Cooperative Reservoir Company and the Brady Irrigation Company "as agents of their shareholders" and stated that the shares are mere muniments of title to rights in available water and to proportionate interests in the irrigation systems operated by such corporation. In Brady Irrigation Company vs. Teton County, et al, 107 Mont. 330; 85 Pac. (2d) 350, Mr. Justice Anderson, speaking for the Supreme Court of Montana, in defining the respective interests of the stockholders of the Teton Cooperative Reservoir Company in and to the property held by the latter corporation, pointed out that the "aggregate value" of the rights of the stockholders is the "total value of the property owned by the" Reservoir Company. The Teton Cooperative Reservoir Company is therefore the owner of

a naked legal title burdened with the easements appurtenant to the lands irrigated by means of the irrigation system operated by the Reservoir Company.

If a sale under a Writ of Execution issued pursuant to the Judgment which the appellee, Winston Bros. Company has against the Reservoir Company, all that the purchaser at such sale would acquire is the right, title and interest of the Reservoir Company in and to the lands. The sale would not destroy the easements of the landowners who are entitled, through the ownership of the stock of the Reservoir Company, to the use of the irrigation works for the irrigation of their lands.

Chumasero vs. Viall, 3 Mont. 376; MacGinniss Realty Co. vs. Hinerager, 63 Mont. 172, 206 Pac. 436; Fox vs. Curry, 96 Mont. 212, 29 Pac. (2d) 663.

If the property described in the Complaint belonging to the Reservoir Company were sold under a Writ of Execution, surely no one would contend that the contractual rights entitling the owners of the shares of stock of the Reservoir Company to the use of the irrigation works and water, would be terminated. However, the stockholders of the Teton Cooperative Reservoir Company could not compel a purchaser at such execution sale to take the place of the Reservoir Company in the operation of the irrigation system. These stockholders would therefore find themselves in a position whereby they would have certain rights but no remedy whereby they could enforce such rights.

In Osterman vs. Baldwin, 73 U. S. 90, 18 L. Ed. 730, Mr. Justice Davis clearly pointed out that where a bare, naked legal title may be held by one person for the benefit of another, the purchaser at an execution sale obtains no title to the property, as follows:

> "If Holman had the bare, naked, legal title, without any beneficial interest in the property sold, and no possession, nothing passed by the sale. A purchaser, at a sheriff's sale, buys precisely the interest which the debtor has in the property sold, and takes subject to all outstanding equities."

In Story vs. Black, 5 Mont. 26, 1 Pac. 5, Mr. Chief Justice Wade, in pointing out that a court of equity will protect the equitable rights of third persons against a legal lien, said:

> "The purchaser at a sale of real property on execution acquires all the right, title, interest and claim of the judgment debtor therein (Code, sec. 329); but he acquires only such right and interest, and he takes the property subject to all the rights and equities of third parties which are capable of being enforced against the judgment debtor. 'The rule of caveat emptor applies to execution sales.' Chumasero v. Viall, 3 Mont. 379.
>
> Says Clifford, J., in Brown v. Pierce, 7 Wall. 218: "The correct statement of the rule is, that the lien of the judgment creates a preference over subsequently acquired rights, but in equity it does not attach the mere legal title to the land, as existing in the defendant at the time of its rendition, to the exclusion of a prior equitable title in a third person."
>
> "Guided by these considerations, the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered."

In Princeton Mining Co. vs. First National Bank of Butte, et al, 7 Mont. 530, 19 Pac. 210, Mr. Justice Bach, speaking for the Court, said:

> "And it is also a rule of law that where a judgment creditor attaches real estate of his judgment debtor, and that property is held by the said judgment debtor in trust, the judgment creditor (at least when purchasing with actual notice) obtains no right as against the cestui que trust of that property, even though the trust is no part of the records. See Osterman v. Baldwin, 6 Wall. 116; Brown v. Pierce, 7 Wall. 205; Chumasero v. Viall, 3 Mont. 376; Story v. Black, 5 Mont. 26."

If we grant that a sale under the Writ of Execution issued to Winston Bros. Company can be made of the property of the Teton Cooperative Reservoir Company which is necessary and used for the irrigation systems in question, the purchaser would acquire only such an interest in the property as the Reservoir Company has. The legal title of the Reservoir Company would be burdened with the easements in the property, which the stockholders of the Reservoir Company have. In other words, the purchaser at an execution sale would step into the shoes, so far as the ownership of the property is concerned, of the Reservoir Company, but such purchaser could not replace the Reservoir Company as a distributor of water because it could not be said that such purchaser would be compelled to assume the contractual obligations of the Reservoir Company incurred by the issuance of stock by the last mentioned company.

Section 15 of Article 3 of the Constitution of the State of Montana provides that:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

Under and by virtue of the foregoing constitutional provision, the rights of the stockholders of the corporation to the use of the water and right of way over the lands of the Reservoir Company for all ditches, drains, flumes, canals and aqueducts is a public use. Whether the Reservoir Company is a public corporation or not, it is performing the functions of a public corporation by distributing the water used for irrigation purposes to its stockholders. If Winston Bros. Company were permitted to cause this property to be sold under and by virtue of a Writ of Execution, the corporate existence, so far as the stockholders of the Reservoir Company are concerned, would be terminated, since the effect of the contracts between the stockholders and the Reservoir Company would be destroyed. Under such circumstances, it is the general rule that courts of equity will intercede for the purpose of restraining a sale. This rule is very well illustrated in Gue vs. The Tidewater Canal Company, 65 U. S. 228, 16 L. Ed. 635, where Mr. Chief Justice Taney said:

"Upon the matters alleged in the bill and answer, several questions of much interest and importance have been raised by the respective parties and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, be-

cause, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this fi. fa. and, consequently, the circuit court was right in granting the injunction.

The Tide Water Canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susquehanna river usually passes, in order to reach tide water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the marshal is, of itself, of scarcely any value apart from the franchise of taking toll, with which it is connected, in the hands of the company, and if sold under this fieri facias without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties show it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them."

Mr. Justice Bennett, in Eldridge vs. Mill Ditch Co., 90 Ore. 590, 177 Pac. 939, after quoting extensively from Gue vs. Tide Water Canal Co., said:

"It seems that all of these questions enter more or less into this case, and all are reasons why the property of this mutual water company held and used for the benefit of its stockholders alone and used for the purpose of transmitting and delivering water appropriated by them, and used upon their respective land, ought not to be permitted to be sold upon an execution against the water corporation.

It seems to be pretty well settled, in the states having water codes similar to that of our own state, even in cases of public service corporations organized for profit and selling water to the general public, that the water and ditch rights really belong to the individual appropriator and are appurtenant to the lands upon which the same are used, and that the corporation transmitting the same is in the nature of a holding company or agent for the true owners of the water rights. Weil on Water Rights (3d Ed.) vol. 2, para. 1339, p. 1237, and authorities cited.

How much more so must this be true in the case of a mutual water company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled. The relation hereon the part of the corporation seems to be clearly that of a holding company, trustee, or agent for the real owners of the water who are putting it to a beneficial use upon their lands. It would seem clearly that the corporation in such a case had no interest in the water or ditches which equity would permit it to sell and transfer to outside parties, and thereby deprive the water users of the same, and, if this could not be done by private contract, it certainly could not be done by an involuntary sale under execution.

> The sale in question could work no useful purpose, but would practically destroy the entire property, and embarrass and hinder the owners of the water and perhaps prevent them from obtaining it, at all."

The reasoning adopted by the courts in the foregoing cases, holding that equity will intervene and to prevent a sale of property in a case such as this, is applicable to the facts in the instant case, since a sale of the property of the Reservoir Company would result to destroy the irrigation facilities of the stockholders of the Reservoir Company, while a purchaser under a Writ of Execution would, most probably, realize scarcely anything for the irrigation works which would be utterly useless to such purchaser.

The Complaint States a Cause of Action to Remove Cloud on Title.

In the Complaint and Petition for Declaratory Judgment, appellant alleged that the judgment is in fact not a lien against the property on which the irrigation system is located, but that unless it be adjudged and decreed that said Judgment is not a lien, the same will be and remain a cloud upon the title of the property in question. Section 57 of the Judicial Code, 28 USCA 118, provides in part as follows:

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the

court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be."

The property of the Reservoir Company is all located in the District of Montana. The defendant, Winston Bros. Company, is a citizen of the State of Minnesota. Therefore, under the foregoing section, the District Court had jurisdiction for the purpose of enforcing the claim of the plaintiff to the property of the Reservoir Company.

Dick vs. Foraker, 155 U. S. 404, 39 L. Ed. 201;

Johnson vs. North Star Lumber Company, 206 Fed. 624;

Louisville, etc. Railway Co. vs. Western Union Telegraph Co., 234 U. S. 369, 58 L. Ed. 1356.

In Thompson vs. Emmett Irrigation Dist., (9 Cir.) 227 Fed. 560, Mr. Circuit Judge Morrow, of this Court, said:

"For the present purposes the allegations of the bill must be taken as true. They state a case for the removal of a cloud upon the title to personal property. It has been held that such a case is within the jurisdiction of a court of equity. 6 Pomeroy's Equity Jurisprudence, para. 729; Sherman v. Fitch, 98 Mass. 59; Voss v. Murray, 50 Ohio St. 19, 32 N. E. 1112; Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114; Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048; Earle v. Maxwell, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; Magnuson v. Clithero, 101 Wis. 551, 77 N. W. 882; New York & New Haven Ry. Co. v. Schuyler, 17 N. Y. 592.

This jurisdiction is recognized as existing in a federal court of equity by section 8 of the act of March 3, 1875 (18 Stats. 472), incorporated into section 57 of the Judicial Code. Jellenik v. Huron Copper Min. Co.,

117 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; Louisville & Nashville Ry. Co. v. Western Union Tel. Co., 234 U. S. 369, 371, 34 Sup. Ct. 810, 58 L. Ed. 1356."

The Complaint States a Cause of Action for a Declaratory Judgment.

In the prayer of the Complaint, the appellant prayed for a permanent injunction and also for a Declaratory Judgment declaring the rights of the parties in the premises. (R. pp. 19-20.) The Federal Declaratory Judgment Act, 28 USCA 400, provides:

"In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

From the allegations of the Complaint it is clear that an actual controversy exists between the appellant and appellee, Winston Bros. Company. We have heretofore pointed out that coercive relief by way of injunction and to quiet the title of the plaintiff could have been granted by the District Court. It has repeatedly been held that when an actual controversy exists, of which, if coercive relief could be granted in it, the Federal Courts would have jurisdiction, and should assume jurisdiction for the purpose of declaring the rights of the parties.

Gully vs. Interstate Natural Gas Co., Inc., (5 Cir.) 82 Fed. (2d) 145; Nashville C. & Stlr. Co. vs. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; U. S. vs. West Virginia, 295 U. S. 463, 55 S. Ct. 789, 79 L. Ed. 1546.

Appellant Derived No Benefits from the Work which was the Foundation for the Indebtedness Evidenced by the Judgment.

It is alleged in the Complaint that when the Bynum Irrigation District acquired its stock in the Reservoir Company, the same was acquired for the purpose of supplying water for irrigation purposes, and in order to irrigate the lands within the district, it became necessary to provide funds for the Reservoir Company in the sum of $122,034.62, for the purpose of enlarging the reservoir. (R. p. 11, par. 11.) The promissory note on which the judgment was rendered represented the balance of the indebtedness of the Reservoir Company incurred to Winston Bros. Company for construction work in connection with enlarging this reservoir. This construction work was done through the ownership of the Irrigation District of 804 shares of the capital stock of the Reservoir Company, all of which was known to Winston Bros. Company, the appellee. The agreement between the Reservoir Company and the appellee, Winston Bros. Company, provided for the enlargement of this reservoir for the sum of $122,034.62. The note on which the judgment was based is for the balance of this contract price. (R. pp. 12-15.)

It is clear from the allegations of the Complaint that the judgment was based on an indebtedness incurred by the Reservoir Company for the sole purpose of providing water for the Bynum Irrigation District. Therefore, all the benefits derived were in favor of the Irrigation District. This District is hopelessly insolvent and bankrupt. (R. p. 14.)

If the property of the Reservoir Company can be sold under and by virtue of a Writ of Execution issued on the judgment, the appellant who derived none of the benefits for which the indebtedness was incurred, would be deprived of its interest in the property for no default on its part, since the appellant has no means of compelling the Bynum Irrigation District to pay the whole or any proportionate share of the judgment in question.

We respectfully submit that the District Court should have overruled the Motion to Dismiss and to have disposed of the case by declaring the rights of the various parties in and to the irrigation works, and to have rendered a permanent injunction restraining the appellee, Winston Bros. Company, from claiming any lien against such irrigation works, and from selling any part of the property, under and by virtue of a Writ of Execution.

Respectfully submitted. Church & Jardine

by Art Jardine

J. H. Freeman

J. P. Freeman

Ernest Abel

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